Court File No: A-440-19

FEDERAL COURT OF APPEAL

BETWEEN:

TEKSAVVY SOLUTIONS INC

APPELLANT

– and –

BELL MEDIA INC AND OTHERS

RESPONDENTS

– and –

CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

PROPOSED INTERVENER

MOTION RECORD OF CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

(Motion in Writing for Leave to Intervene)
Pursuant to Rules 109 and 369 of the Federal Courts Rules

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CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

PROPOSED INTERVENER

NOTICE OF MOTION OF
CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

(Motion in Writing for Leave to Intervene)
Pursuant to Rules 109, 359, and 369 of the Federal Courts Rules

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TAKE NOTICE THAT the proposed intervener Canadian Internet Registration Authority (CIRA) will make a motion to the Court in writing under Rules 109 and 369 of the Federal Courts Rules, as amended.

THE MOTION IS FOR an order:

1. granting CIRA leave to intervene in this appeal;

2. permitting CIRA to file a factum of no more than 20 pages;

3. permitting CIRA to present oral arguments for 15 minutes at the hearing of this appeal; and

4. imposing other terms the motions judge may deem appropriate.

THE GROUNDS OF THE MOTION ARE:

1. CIRA proposes to intervene in this proceeding with written and oral submissions on two of the four grounds of appeal raised in the Appellant's Notice of Appeal:

   (a) CIRA would not address the Appellant's first ground of appeal—availability under the *Copyright Act*, RSC 1985, c C-42, or other law of the "site-blocking remedy".

   (b) CIRA would address the Appellant's second ground of appeal—applicability of section 36 of the *Telecommunications Act*, SC 1993, c 38, to site blocking.

   (c) CIRA would address the Appellant's third ground of appeal—interpretation and application of the test for the site-blocking remedy of a mandatory injunction.

   (d) CIRA would not address the Appellant's fourth ground of appeal—compliance with *The Constitution Act, 1982,* Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

2. CIRA would submit that section 36 of the *Telecommunications Act* requires caution in the exercise of a court's discretion to grant a site-blocking remedy, as elaborated at paragraphs 40-49 of the Written Representations accompanying this Notice of Motion.

3. CIRA would submit that the interpretation and application of the test for a site-blocking injunction requires exceptional circumstances and minimal impairment of the technical architecture and functions of the internet, as elaborated also at paragraphs 40-49 of CIRA's Written Representations.

4. CIRA's participation will assist the determination of factual and legal issues related to the appeal:

   (a) CIRA is directly affected by and genuinely interested in this appeal because site-blocking impacts CIRA's ability to steward the .CA domain, and provide high quality registry, DNS and cybersecurity services. CIRA will, therefore, draw on its knowledge, skills, and

resources as an actively engaged supporter of the internet community to provide further, different, and valuable submissions.

(b) The availability of a site-blocking remedy is a justiciable issue of veritable public interest, as shown by CIRA's national and international experiences with the matter.

(c) There is no other reasonable or efficient way to submit CIRA's perspective to the Court, because the issues CIRA is genuinely interested are already being raised now, in this particular proceeding.

(d) CIRA's position is not adequately represented by one of the parties or another proposed intervener because its perspective is different from media companies, communications intermediaries, website operators, and public interest organizations.

(e) CIRA's intervention would serve the interests of justice because the issue of site blocking is being litigated at an appellate court for the first time in Canada. The issue has such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties. And the proposed intervention would assist the Court without any delay or prejudice.

(f) overall, the Court could hear and decide the matter better with CIRA than without CIRA.

5. CIRA does not seek costs and asks that it not be liable for costs to any other party if leave to intervene in this appeal is granted.

6. Rules 109 and 369 of the *Federal Courts Rules*, and such further and other grounds as counsel may advise and this Honourable Court may permit, support CIRA's motion.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in the motion in writing:

1. the detailed and well-particularized affidavit of Byron Holland, President and Chief Executive Officer of CIRA, sworn February 3, 2020; and

2. such further and other material as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED February 4, 2020.

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B E T W E E N:

TEKSAVVY SOLUTIONS INC

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CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

PROPOSED INTERVENER

AFFIDAVIT OF BYRON HOLLAND

I, Byron Holland, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am the President and Chief Executive Officer (CEO) of the Canadian Internet Registration Authority (CIRA). This Affidavit is sworn in support of CIRA's motion for leave to intervene in this appeal.

2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true. Where specific CIRA activities are referred to below in which I have had no personal participation, I have familiarized myself with the relevant files, and base my account thereof on this knowledge.

II. BACKGROUND ABOUT CIRA

3. CIRA is a member-based, not-for-profit organization best known for managing the .CA top-level internet domain name on behalf of all Canadians, developing and implementing policies for the .CA domain that support Canada's internet community, and representing the .CA registry internationally.

4. The .CA domain was administered by John Demco of the University of British Columbia and a committee of volunteers from 1987 to 1999. Recognizing that arrangement was becoming inappropriate for the size and role of the internet in Canada, a consultative committee was formed at the Canadian internet community's annual conference in 1997. Following public consultation, the committee recommended that a not-for-profit corporation be set up to take over administration of the .CA domain.

5. The report of the Canadian Domain Name Consultative Committee, from September 1998, establishes the "Framework for the administration of the .CA domain name system." It addresses, among other things, the objectives of CIRA, details of how the registry (*i.e.* CIRA) will operate, provisions on registrars, applicants, and registrants, and more. A copy of that report is publicly accessible online. CIRA was incorporated in December 1998 to implement these functions.

6. In March 1999 the Government of Canada recognized CIRA as the administrator of the .CA domain. A copy of the letter to then Chair of CIRA, Robert Hall, from then Assistant Deputy Minister of Spectrum, Information Technologies and Telecommunications at Industry Canada, Michael Binder, recognizing CIRA as the administrator of the .CA domain is publicly accessible online.

7. The letter to CIRA from Industry Canada instructs the CIRA Board to put in place an effective structure for, among other things, "conducting CIRA's activities in an open and transparent manner that ensures wide public access to all relevant information;" and "ensuring an appropriate balance of representation, accountability, and diversity on the Board of Directors for all categories of stakeholders". It notes that the .CA domain "is a key public resource, helping to promote the development of electronic commerce in Canada and important to our country's future social and

economic development," and that the Government of Canada has "a continuing interest in the progress of CIRA".

8. In October 2000, the Government advised the Internet Corporation for Assigned Names and Numbers (ICANN) that it formally designated CIRA as the .CA delegee. ICANN is the California based not-for-profit corporation responsible for global coordination of, and policy on, the internet's unique identifiers, including internet protocol addresses and domain names. A copy of the letter to ICANN from then Assistant Deputy Minister of Spectrum, Information Technologies and Telecommunications at Industry Canada, Michael Binder, designating CIRA as the administrator and manager of .CA is publicly accessible online. CIRA became the official .CA registry on December 1, 2000. CIRA remains the only body designated by the Government of Canada to ICANN.

III. CIRA'S GOVERNANCE, MEMBERSHIP, AND EXPERTISE

9. As President and CEO, I oversee the operations and resources of the organization and serve as the primary point of communication with the Board of Directors.

10. An elected Board of 12 directors and three non-voting advisors is responsible for managing the business and affairs of CIRA. Per CIRA's bylaws, the Government of Canada appoints a representative to one of the non-voting advisor positions. Directors are nominated and elected annually by CIRA members and come from diverse professional and geographic backgrounds. The CIRA Board considers pan-Canadian perspectives when managing .CA and when representing Canada and the .CA registry internationally.

11. In addition to CIRA's leadership team, which includes our chief technology officer, and our support staff, there are approximately 50 technologists at CIRA who, on a daily basis, maintain and improve critical Canadian internet resources. This work includes maintaining the .CA domain name system (DNS) and registry services. It also includes supporting a network of Canadian internet exchange points, working to enhance the security of Canadian domain name and internet traffic routing systems, international work on internet security and stability, and assistance in maintaining other top-

level domain names on an outsourced basis. CIRA's technical staff have education and experience in computer science, engineering, data sciences, cybersecurity, analytics, mathematics and other related disciplines. They are sought out by their technical communities worldwide for advice, guidance, and collaboration.

12. As a not-for-profit corporation, CIRA's membership is comprised of .CA domain registrants. Upon registration of a .CA domain, a registrant has the option of becoming a CIRA member free of cost.

IV. CIRA'S MANDATE, PROGRAMS AND SERVICES

13. As a purpose-driven internet champion, CIRA connects, protects and engages the internet community in Canada and beyond by ensuring the stewardship of the .CA domain, providing high quality registry, DNS and cybersecurity services, and actively engaging and supporting the community.

14. CIRA's objects are set out in Supplementary Letters Patent issued in 2006 (publicly accessible online), which were carried over in its Statement of Purpose in the Certificate of Continuance (also publicly accessible online) bringing CIRA under the new not-for-profit corporations legislation. CIRA's Statement of Purpose was amended in 2019. The purposes of CIRA are to act as the registry for the .CA Internet domain; to provide professional registry services, DNS and related services; to develop, carry out, and/or support other Internet-related activities that promote the good governance development and use of the Internet for Canada; and to do all such things that are incidental or conducive to the attainment of these purposes.

15. In pursuing these purposes within Canada and in cooperating with the international internet community to coordinate them at the international level, CIRA has long prioritized the principle of an open internet as essential to ensuring that the internet's different components operate together in an effective and standards-based manner. Under the open internet principle, the content of internet communications are not controlled or interfered with by intermediaries except where justified in extraordinary circumstances.

16. In practice, CIRA's functions include: (A) developing and implementing systems for registering .CA domain names and maintaining the related "WHOIS" directory linking registrants to domain names; (B) developing and implementing policies that support Canada's internet community and (C) representing the .CA domain internationally.

A. The .CA domain name system and registry

17. In the DNS, a top-level domain (TLD) is the part of a domain name that appears to the right of the dot; for example, COM, NET, CA, UK, or BIZ. There are over 1500 TLDs available. The authoritative list of all TLDs is maintained by the Internet Assigned Numbers Authority (IANA) in the Root Zone Database, overseen by ICANN.

18. A country-code top-level domain (ccTLD) is generally used and reserved for a country, sovereign state, or territory as identified with an International Organization for Standardization (ISO) 3166-1 alpha-2 country code. Canada's ccTLD is .CA.

19. CIRA's primary responsibility is to manage the .CA top-level domain and the underlying authoritative DNS services. This responsibility arises from the management function extended to CIRA in the 1999 letter from the Government of Canada. ICANN and the IANA recognize CIRA as the authoritative TLD manager for the .CA ccTLD. Consequently, CIRA maintains authoritative control of the .CA ccTLD. CIRA is responsible for ensuring the uniqueness of domains in the .CA zone and maintaining the authoritative directory of domain names therein. There are now more than 2.8 million .CA domain names, which CIRA has registered.

20. In addition to operating .CA, CIRA now also provides services to other TLDs. For example, CIRA provides DNS services for .PT, .SE, and .ES. (the Portuguese, Swedish, and Spanish ccTLDs) and numerous others. CIRA also provides registry services for .SX (the Sint Maarten ccTLD), .KIWI (a New-Zealand-focused TLD), and .MLS (a global TLD related to the real estate industry).

21. Running the authoritative registry of .CA domains includes maintaining a database of records

for all direct and indirect ways of pointing to a website, email address, and/or web services associated with a .CA domain name. These records are associated with internet protocol (IP) addresses and are defined by the domain name Registrant. This means that when a user queries the DNS, CIRA's authoritative system is responsible for telling all recursive DNS resolvers, including those operated by Internet Service Providers (ISPs) in Canada, the corresponding IP addresses of domains ending in .CA. When a recursive resolver substitutes its own response for the real one present in the authoritative registry, then the registry suddenly becomes inaccurate for a subset of users.

22. Persons who wish to register a .CA domain name (registrants) do not deal directly with CIRA. Instead, they must deal with a CIRA-certified registrar. Registrars are organizations certified by CIRA to facilitate the registration, transfer, renewal and modification of registration data for registrants.

23. Only CIRA-certified registrars may apply to CIRA for the registration of domain names in the .CA registry and request modifications and other transactions with respect to .CA domain name registrations (for example transfers, renewals, etc.) pursuant to agreements, policies, rules and procedures set by CIRA and agreed to by the certified registrars.

24. A registrant requests a .CA domain name from the certified registrar who then verifies that the domain name has not been registered by anyone else. If it is available, the certified registrar registers the domain name with CIRA on behalf of the registrant.

25. CIRA, once it approves the registration request, then adds the domain name to the registry database and the registrant can begin using it for a website, email, or other internet or web service.

26. The CIRA Dispute Resolution Policy (CDRP) is a mechanism through which individuals and businesses can obtain quick, out-of-court arbitrations at relatively low cost for clear-cut cases of bad faith registration of .CA domain names. A copy of the CDRP is publicly accessible online. As a result of the CDRP, CIRA is familiar with intellectual property issues and has experience developing and overseeing guidelines for the neutral, independent resolution of intellectual property disputes.

27. CIRA also maintains a look-up directory, which permits queries to the .CA Registry database to determine the availability of .CA domain names or to view the registration details of people who have registered a .CA domain name. The directory is known as WHOIS (who is). WHOIS is an internet protocol used for querying databases that store information about the registered users of internet resources, including domain names and IP addresses.

28. When registering a .CA domain name with a registrar, the registrant enters into a registrant Agreement with CIRA. CIRA's standard Registrant Agreement is attached as Exhibit G.

29. Upon registration of a new .CA domain name, CIRA collects the following information about all .CA domain name registrant from the registrar: registrant name, postal address, email address, and phone number. This information is contained in the .CA WHOIS directory.

30. While all TLD managers perform a WHOIS function, there are differences between what information TLDs make public, based on their respective policies. These policies are often informed by the legal and regulatory jurisdictions in which a given TLD manager operates.

31. When a registrant registers a domain name as a corporation or other legal entity, its contact details are made publicly visible by default in CIRA's WHOIS.

32. When a registrant registers a .CA domain as an individual person, her or his personally identifiable information is not publicly visible; it is automatically redacted from the public directory. When querying the CIRA WHOIS for a domain registered by an individual, the following appears: "Personal information about the holder of this domain name is not available in the search results because the registration is privacy protected."

33. While the personally identifiable information of individual registrants is redacted from the public WHOIS, CIRA nevertheless preserves this information. CIRA's practice is to disclose this information to third parties if legally compelled, such as pursuant to an order from a Canadian court.

34. In sum, the information in a WHOIS record is defined by the Registrant, provided to the

Registrar through which they purchased the domain name, then transmitted to CIRA in order for CIRA to maintain an accurate authoritative directory for the .CA ccTLD DNS.

B. Developing and implementing policies that support Canada's internet community

35. CIRA engages in a growing number of activities outside of its traditional domain name services that support the stability, security, and proper functioning of the Canadian internet. These activities relate to CIRA's broader work developing, carrying out, and supporting internet-related activities in Canada.

36. CIRA has fostered the development of Internet Exchange Points (IXP) in Canada. An IXP is the physical infrastructure through which network operators exchange Internet traffic between their networks. The purpose of an IXP is for networks to interconnect directly, rather than through a third-party network.

37. The primary advantages of direct interconnection in an IXP are improved network resilience, cost, latency, more efficient bandwidth usage and more local traffic exchange. For instance, by exchanging traffic at an IXP, Canadian internet providers are able to deliver internet communications without routing it through the United States.

38. Since CIRA became involved, Internet exchange points have opened across the country, now operating in Vancouver, Calgary, Edmonton, Saskatoon, Winnipeg, Toronto, Ottawa-Gatineau, Montreal, Moncton, Saint John, and Charlottetown, with work underway in the Arctic.

39. CIRA has played an active role in improving the cybersecurity and resilience of the Canadian internet through campaigns encouraging Canadian internet providers to adopt secure domain name and routing protocols, and through a related line of "D-Zone" products. CIRA's D-Zone products include secondary DNS services that help resolve domain names; firewalls that protect domain name services against intrusion; and staff training.

40. CIRA operates a Community Investment Program to fund innovative community internet

projects that build a resilient, trusted and secure internet for all Canadians. The Community Investment Program has helped advance more than 150 projects related to internet infrastructure, cybersecurity, digital literacy, and community leadership in Canada.

41. CIRA engages directly in policy development that relates to the stewardship of the internet. From 2011 to 2018, CIRA served as the convener of an annual event known as the Canadian Internet Forum, bringing together various stakeholders for a national discussion on key issues affecting access to, and the safety, privacy and security of, the Canadian internet.

42. In 2019, the annual Internet Forum was re-focused to become one of 88 national and regional initiatives of the global Internet Governance Forum (IGF); an initiative of the United Nations that serves as a forum for policy dialogue on issues of global internet governance. CIRA now serves the secretariat function for the Canadian IGF, a multi-stakeholder collaboration on internet governance with other Canadian organizations.

43. An aspect of developing and implementing policies that support Canada's internet community is participating in proceedings related to site blocking, described below.

C. Representing the .CA domain name internationally

44. CIRA represents the .CA registry internationally and participates in several fora for multi-stakeholder policymaking and standards coordination in the global internet governance ecosystem.

45. CIRA participates regularly in meetings of the ICANN. I have personally served as both Chair (2014-2017) and Vice Chair (2017-present) of the Country Code Name Supporting Organization (ccNSO). The ccNSO is a body within ICANN that provides a platform to foster policy consensus and technical cooperation among ccTLDs and facilitates the development of best practices for ccTLD managers.

46. From 2014-2015, I served as Chair of an ICANN working group responsible for developing a proposal to transition the historical oversight of the United States government over the IANA functions

to the private sector. This came to fruition on September 30, 2016 in a process known as the IANA Stewardship Transition. Following the IANA stewardship transition to the private sector, I served as the founding Chair (2016-2019) of the Customer Standing Committee (CSC). The CSC is comprised of representatives from both generic (gTLD) managers and ccTLD managers, who now perform the oversight function previously executed by the United States government.

47. CIRA's Chief Technology Officer, Jacques Latour, is a member of the Security and Stability Advisory Committee (SSAC) at ICANN. This committee is responsible for advising the ICANN community and the ICANN Board on matters related to the security and integrity of the Internet's naming and address allocation systems. In 2012, the SSAC published an advisory report about the impacts of content blocking, including site blocking, via the domain name system.

48. From 2018-2019 I served on the high-level advisory group of the Internet & Jurisdiction Policy Network (I&J network), a multistakeholder organization with a mandate to enhance legal interoperability and reduce jurisdictional tensions in internet governance. I currently serve as a member of the group with a mandate to consider issues of jurisdiction related to domain names and the DNS, specifically including questions about how the neutrality of the internet's technical layer can be preserved when national laws are applied to the DNS. Discussion of the role of "trusted notifiers" and/or judicial oversight in internet governance, including site blocking, features prominently in this work.

IV. CIRA'S PARTICIPATION IN RELATED PROCEEDINGS

49. CIRA has participated in related regulatory and policymaking proceedings about site blocking.

50. CIRA made submissions to the Canadian Radio-television and Telecommunications Commission (CRTC) in response to the 2018 site blocking proposal by Fairplay Canada. CIRA opposed the Fairplay proposal on the grounds that website blocking by ISPs should only be permitted in exceptional or extreme circumstances due to the potential for unintended harm caused by relying on the DNS to block content, and to the ability of users to circumvent such blocking mechanisms.

51. CIRA made submissions to the government-appointed panel responsible for conducting the Broadcasting and Telecommunications Legislative Review in 2019. CIRA's submissions centred on the technical arguments for continued separation of broadcasting and telecommunications legislation. Communications law in the digital age, CIRA submitted, should attempt to regulate at those points on the internet most directly associated with the related policy objectives. CIRA also explained how content blocking is inconsistent with the principle of network neutrality.

52. CIRA's engagement in international proceedings—such as work toward the ICANN's SSAC report about the impacts of content blocking on the DNS, work with the I&J network on trusted notifiers and judicial oversight, and work on internet governance work with other organizations through the IGF—also address the issue of site blocking.

53. CIRA did not intervene in the Federal Court proceedings in this matter because it was unaware that proceeding had been commenced. It was not named as a party nor contacted by any of the parties. CIRA learned about the Federal Court decision from news reporting. Only after reading about the decision, and reviewing the decision itself, did CIRA become aware of the decision's impact on CIRA and matters of genuine interest to CIRA.

IV. CIRA'S INTEREST IN THIS APPEAL AND PROPOSED SUBMISSIONS

54. CIRA is especially affected by and interested in two of the four grounds of appeal raised in the Appellant's Notice of Appeal:

a) CIRA does <u>not</u> propose to address the Appellant's first ground of appeal—availability under the *Copyright Act*, RSC 1985, c C-42, or other law of the "site-blocking remedy".

b) CIRA does propose to address the Appellant's second ground of appeal—the applicability of section 36 of the *Telecommunications Act*, SC 1993, c 38, to site blocking.

c) CIRA does propose to the Appellant's third ground of appeal—the interpretation and application of the test for the site-blocking remedy of a mandatory injunction.

d) CIRA does not propose to address the Appellant's fourth ground of appeal—compliance with *The Constitution Act, 1982,* Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

55. CIRA is interested in whether section 36 of the *Telecommunications Act* requires caution in the exercise of a court's discretion to grant a site-blocking remedy. CIRA is also interested in whether the interpretation and application of the test for a site-blocking injunction requires exceptional circumstances and minimal impairment of the technical architecture and functions of the internet.

56. CIRA intervened in the CRTC's related proceeding on site blocking to present such concerns, and to offer helpful submissions to the CRTC on mitigating them. CIRA has also participated in related international proceedings considering site blocking and seeks to present its perspectives from those experiences to this Court.

57. The technical mechanisms required to comply with the Federal Court's order involve ISPs redirecting their customers' DNS queries. CIRA would present to this Court a concern that a site-blocking remedy orders an ISP to control the content or influence the meaning or purpose of telecommunications via the internet without CRTC approval. A site-blocking order, by its nature, compels ISPs to interfere with internet telecommunications by redirecting their customers' DNS queries away from a domain name registered under CIRA's authority.

58. Ordering ISPs to intercept and redirect internet communications could conflict with CIRA's longstanding commitment to maintain an open and effective internet architecture that results from the coordination of the many participants who take responsibility for operating different technical aspects of the Canadian internet. Making such an order without the benefit of the multi-stakeholder technical forum provided by a CRTC hearing is of particular concern in this regard. It could jeopardize CIRA's mission to steward the .CA domain and to provide high quality registry, DNS, and cybersecurity services.

59. If granted leave to intervene in this proceeding, CIRA would submit that there are more effective and appropriate control points relating to the internet to address allegations of copyright infringement.

For example, rather than site blocking, which CIRA would submit conflicts with section 36 of the *Telecommunications Act*, content owners could pursue a range of other measures.

60. Those measures would include, in CIRA's submission, seeking disclosure of the identity of a domain name registrant so that the defendant can be named, served, and involved (or, knowingly, not involved) in the proceeding. CIRA maintains information about registrants as part of managing the WHOIS look-up. Its practice is to disclose this information to third parties if legally compelled, such as pursuant to an order from a Canadian court.

61. CIRA would assist the Court to assess the relative advantages and disadvantages of involving domain name registries, rather than ISPs, in addressing alleged online copyright infringement. CIRA would submit that less extreme measures than site blocking may also involve identifying, notifying, and involving the operators of servers where allegedly infringing content is hosted. It might also involve identifying and enlisting the cooperation of other third parties, such as information location, content distribution, and payment intermediaries. Any and all of those options are, while still extreme, more consistent with the *Telecommunications Act* and less intrusive into the technical architecture of the internet than the remedy sought from and granted by the Federal Court.

62. Alternatively, CIRA would submit to this Court that some form of CRTC involvement in the process of issuing, altering, coordinating, or enforcing a site-blocking order might be required by section 36. Based on its technical expertise and experience with internet governance, CIRA could help this Court consider why such a solution would be less harmful to the functioning of the internet and what options exist for implementing it.

63. CIRA would also make submissions on interpreting and applying the test for a mandatory site-blocking injunction. The interpretation and application of the test for a site-blocking injunction requires, CIRA would submit, exceptional circumstances and minimal impairment of the technical architecture and functions of the internet.

64. Based on its experiences participating in international fora where internet governance, and site

blocking specifically, is discussed, CIRA would submit that the factors considered in foreign cases could be relevant in certain situations in Canada. CIRA would assist this Court in considering international approaches to the issue of site blocking, including whether and how those approaches fit with the systems for administering internet domain names and the DNS in Canada.

65. However, CIRA would submit that different factors than those emphasized by the Federal Court, or likely to be emphasized by the parties, are the most relevant. For example, the Federal Court's reasons for decision include only one short sentence on safeguards. CIRA would submit that safeguards are a crucial consideration. Also, in considering fairness, the Federal Court's reasons only touch upon the topic of network neutrality. CIRA would submit to the Court that this factor requires more attention and detail than the Federal Court provided.

66. While CIRA is also somewhat interested in the availability of a site-blocking remedy under the *Copyright Act* or other law, and the compliance of a site-blocking remedy with *The Constitution Act, 1982*, those two issues are not squarely within CIRA's mandate or expertise. CIRA would not make submissions on those two issues. Instead, CIRA has consulted with the Canadian Internet Policy and Public Interest Clinic (CIPPIC), another proposed intervener in this appeal, to ensure that CIRA's submissions are distinct from its submissions.

67. CIRA will not raise new issues or broaden the issues on appeal. Nor will CIRA seek to introduce new facts into evidence. Rather, CIRA staff and counsel have reviewed the evidentiary record from the Federal Court and the parties' Agreement re: Appeal Book. CIRA intends to rely solely on the record that will already be before this Court.

68. CIRA will not seek costs and asks that it not have costs awarded against it in the event that leave to intervene is granted.

THE TIMING OF CIRA'S MOTION

69. CIRA acted as quickly to propose intervening as it reasonably could. When the Federal Court

order and reasons were released in mid-November, I and other CIRA staff reviewed the matter and considered the implications. I and other CIRA staff discussed the implications and a possible intervention with each other, with the Chair of the Board, and with other formal and informal advisors. After approximately two to three weeks, in early December, CIRA sought external counsel. Counsel was retained and instructed just before the holiday break in December. CIRA and its counsel reviewed the matter, prepared draft submissions, consulted with another proposed to avoid duplication in January 2020, and filed this motion as soon as practicable.

70. I make this affidavit in support of CIRA's Motion for Leave to Intervene in this appeal and for no improper purpose.

SWORN before me at the City of Ottawa in the Province of Ontario this February 3, 2020.

Byron Holland

Commissioner for Taking Oaths

Albert Chang

Court File No: A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

– and –

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CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

PROPOSED INTERVENER

WRITTEN REPRESENTATIONS OF
CANADIAN INTERNET REGISTRATION AUTHORITY (CIRA)

(Motion in Writing for Leave to Intervene)
Pursuant to Rules 109 and 369 of the Federal Courts Rules

PART I – THE NATURE OF THIS MOTION

1. This motion in writing is for an Order granting the Applicant, Canadian Internet Registration Authority (CIRA), leave to intervene in this appeal.

PART II – THE FACTS

2. CIRA seeks leave to intervene on two of the Appellant's four grounds of appeal: the applicability of section 36 of the *Telecommunications Act*[1] and the interpretation and application of the test for a site-blocking remedy. CIRA does not propose to address the Appellant's other two grounds of appeal:

[1] *Telecommunications Act*, SC 1993, c 38.

the availability of a site-blocking remedy under the *Copyright Act*[2] or other laws and the compatibility of site blocking with the *Charter*[3] right to freedom of expression.[4]

3. CIRA is a member-based, not-for-profit organization best known for managing the .CA country-code top-level domain name (ccTLD) on behalf of all Canadians, developing and implementing policies for the .CA domain that support Canada's internet community, and representing the .CA registry internationally.[5] It was mandated in 1999 by Industry Canada to administer the .CA domain name system (DNS), and officially designated in 2000 to the global coordinator of internet architecture, the Internet Corporation for Assigned Names and Numbers (ICANN), as Canada's .CA domain name manager.[6]

4. CIRA is governed by an elected Board of 12 directors and three non-voting advisors, including a representative appointed by the Government of Canada. Its staff work to maintain and improve the technical aspects of the .CA registry, the DNS, and related systems.[7]

5. CIRA's mission is to connect, protect, and engage the internet community in Canada. It does so by stewarding the .CA domain, providing high quality registry, DNS, and cybersecurity services, and by being active and engaged.[8] In practice, fulfilling CIRA's mandate involves developing and implementing systems related to the .CA domain name,[9] developing and implementing policies that support Canada's internet community,[10] and representing the .CA domain name internationally.[11]

6. CIRA has participated in other proceedings related to site blocking, including proceedings at the Canadian Radio-television and Telecommunications Commission (CRTC) about a proposed site-

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[2] Copyright Act, RSC 1985, c C-42.
[3] The Constitution Act, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
[4] *Affidavit of Byron Holland*, sworn January 30, 2020 at para 54 [*Holland Affidavit*].
[5] *Holland Affidavit* at para 3.
[6] *Ibid* at paras 7-8.
[7] *Ibid* at paras 9-12.
[8] *Ibid* at para 13.
[9] *Ibid* at paras 17-34.
[10] *Ibid* at paras 35-43.
[11] *Ibid* at paras 44-48.

blocking regulatory regime;[12] proceedings at the CRTC about telecommunications law and policy more generally;[13] and proceedings of international bodies considering the impacts of site blocking.[14]

7. CIRA is interested in the applicability of section 36 of the *Telecommunications Act* because it has a longstanding commitment to maintain an open, neutral, and effective internet architecture. CIRA is interested in the interpretation and application of the test for a site-blocking injunction because site-blocking could compromise its mandate to steward the .CA domain and related technologies.[15]

8. CIRA acted expeditiously to bring this motion to intervene, does not want to cause delay or prejudice to the parties, and does not seek and asks that it not be liable for costs.[16]

PART III – SUBMISSIONS

9. The Court may, under Rule 109 of the *Federal Courts Rules*, grant leave to any person to intervene in a proceeding.[17] Paragraph 2(*b*) states the key criterion: will the proposed intervener's participation "assist the determination of a factual or legal issue related to the proceeding." In one of the first cases to consider Rule 109, Justice McGillis called that "the fundamental question to be determined on a motion for intervention."[18]

10. More recently, in *Sport Maska*, Justices Nadon, Pelletier, and Gauthier agreed that "in essence, what Rule 109(2)(*b*) requires"[19] is one particular factor that Justice Stratas articulated in *Pictou Landing*: "whether the intervener will bring further, different, and valuable insights and perspectives that will assist the Court in determining the matter."[20] Justice Stratas described the requirement for different and valuable insights that will actually further the Court's determination as "perhaps the most

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[12] *Ibid* at para 50.
[13] *Ibid* at para 51.
[14] *Ibid* at para 52.
[15] *Ibid* at paras 13-15, 55-58.
[16] *Ibid* at paras 67-69.
[17] *Federal Courts Rules*, SOR/98-106.
[18] *Apotex Inc v Canada (Minister of Health)*, File No. T-2074-99 at para 11.
[19] *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 at para 39.
[20] *Pictou Landing First Nation v Canada (Attorney General)*, 2014 FCA 21 at para 9.

important factor given its prominence in subsection 109(2)".[21] "In the end," Justice Nadon explained, the Court must remain flexible to decide if "the interests of justice require that [it] grant or refuse intervention."[22]

11. CIRA demonstrates below how it will assist the Court with different and valuable insights to determine two of the four grounds of appeal in the Appellant's Notice of Appeal. By offering its different insights and perspectives on the internet's architecture and governance, CIRA will help the Court determine the relationship between section 36 of the *Telecommunications Act* and a website blocking order; the Appellant's second ground of appeal. By deploying its considerable knowledge and skills in relation to internet domain name system, CIRA will help the Court interpret and apply the test for a mandatory injunction to block a domain; the Appellant's third ground of appeal.

12. CIRA does not propose to make submissions on the Appellant's first and fourth grounds of appeal—available remedies under laws including the *Copyright Act* and the relevance of *Charter* rights—although its submissions may incidentally help the Court indirectly on those issues too.

13. To show specifically how the submissions CIRA offers would advance the Court's appreciation of two of the four controlling ideas on which this appeal turns, CIRA follows the *Rothmans, Benson & Hedges* framework.[23] This Court validated the *Rothmans* framework in *Sport Maska*[24] and applied it recently in *Girouard*.[25] Complementary factors elaborated upon by Justice Stratas in *Pictou Landing*[26], *Ishaq*[27] and other proceedings reinforce the helpfulness of CIRA's proposed submissions.

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[21] *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 151 at para 7.
[22] *Sport Maska*, *supra* note 19 at para 42.
[23] *Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74 (FC) at para 12; *Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 84 (FC) at paras 10-11; *Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 90 (FCA) at para 3.
[24] *Sport Maska*, *supra* note 19.
[25] *Girouard v Canada (Attorney General)*, 2019 FC 434 at para 9; *Canadian Council for Refugees v Canada (Minister of Immigration, Refugees and Citizenship)*, 2019 FC 418 at paras 28-29.
[26] *Pictou Landing*, *supra* note 20.
[27] *Ishaq*, *supra* note 21.

CIRA is directly affected by, and has a genuine interest in, the outcome of this appeal.

14. CIRA is "directly affected" by the outcome of this appeal (which is actually the standard required for full party status in applications for judicial review).[28] If the appeal is dismissed and order upheld, CIRA would be directly affected because it would be unable to deliver the technical services it was mandated by Industry Canada and has committed to provide in respect of the GoldTV.ca domain name. As explained at paragraph 57 of the *Holland Affidavit*, the Federal Court's order compels ISPs to redirect their customers' DNS queries away from a domain name registered under CIRA's authority. Furthermore, the *Holland Affidavit* establishes at paragraph 21 that, as the .CA registry operator, CIRA is responsible for the authoritative DNS for all .CA names. This means that when a user queries the domain name system, CIRA's authoritative DNS is responsible for telling all recursive DNS resolvers, including those operated by ISPs in Canada, the corresponding IP addresses of domains ending in .CA. When a recursive resolver, *i.e.* ISP, substitutes its own response for the real one present in the authoritative registry, then the registry suddenly becomes inaccurate for a subset of users. While CIRA is in no way on the side of the domain name registrant, like the registrant CIRA is directly affected by the site-blocking order.

15. However, even if CIRA is unable to meet that interpretation of "directly affected", CIRA does not seek fully party status. Rather, CIRA advances two alternative submissions on this factor of the Rule 109 test from *Rothmans*: either it is satisfied by CIRA's genuine interest, or it is outweighed by the interests of justice factor that includes CIRA's genuine interest. Either way, CIRA has a genuine interest that is relevant to Rule 109.

16. First, CIRA submits that the phrase "directly affected" need not be interpreted exactly as it is in the context of full party status in applications for judicial review. Although doctrinally untidy and intellectually unsatisfying that the same words mean different things in different contexts, in the context of Rule 109 motions, "directly affected" means, in effect, "genuine interest". That seems to have been

[28] *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236.

Justice Rouleau's intent in *Rothmans*, and it is how this factor has been interpreted and applied subsequently. For example, in *Sport Maska*, this Court stated that the applicant "is affected, in a certain way". Justice Nadon then highlighted the applicant's aim of "tactical advantage", declined to criticize that aim as inappropriate, and reached no conclusion on this factor.[29] CIRA is not proposing to intervene in this appeal for any tactical advantage to itself, but rather to fulfil its mandate. CIRA is affected directly or at least "in a certain way" by the outcome of this appeal.

17. Alternatively, the "directly affected" factor is irrelevant in the context of this particular motion, as it and several other factors were in *Prophet River*[30] and, according to Justice Stratas in *Tsleil-Waututh*, "almost always are."[31] At least this factor is—like any other single factor—not determinative. As Justice Stratas has said, failure to establish any one factor is not fatal to a motion for leave to intervene.[32] Instead, this factor is outweighed by CIRA's "genuine interest" in this appeal, which is a key aspect in assessing how the interests of justice are better served by CIRA's intervention.

18. For convenience, CIRA's submissions explaining how it has a genuine interest in assisting the Court, and will thus help the Court advance the interests of justice, are presented here. The key point is that because CIRA is affected in a certain way by, and has a genuine interest in, the outcome of this appeal, it will deploy its considerable knowledge, skills, and resources to assist the Court.

19. Like the successful applicants in *Globalive*, CIRA has a genuine interest in this appeal, namely a "demonstrated commitment"[33] to the stewarding the .CA domain, the DNS, registry, and related technologies and to the minimal impairment of the internet's technical functioning. The affidavit in support of CIRA's motion is specific and detailed in describing CIRA's demonstrated commitment to the principles of openness and minimal impairment. Paragraphs 13-15 of the *Holland Affidavit* set out

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[29] *Sport Maska*, *supra* note 19 at para 71.
[30] *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120 at para 5.
[31] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 at para 33.
[32] *Canada (Minister of Public Safety and Emergency Preparedness) v Zaric*, 2016 FCA 36 at para 9. See also *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 119 at para 5.
[33] *Ibid* at para 5.

these principles underpinning CIRA vision, mission, and strategic plan. Paragraphs 16 through 52 describe in detail how CIRA puts these principles in practice. Paragraphs 54-58 elaborate on CIRA's genuine interest in the two issues it proposes to address, while paragraphs 66-67 explain why CIRA is not interested in addressing the other two issues on appeal or any new issues.

20. CIRA's interest is not purely "jurisprudential in nature", which Justice Noël (as he then was) held insufficient in *Canadian Airlines*.[34] CIRA is not like the unsuccessful applicant in *Amnesty International*, which was described by Justice Ryer as, "in effect, a law firm".[35] Obviously CIRA is interested in the development of jurisprudence on website blocking—this appeal will have repercussions on future litigation involving that issue— but CIRA's genuine interests go further. CIRA does not represent clients or provide advice but it does offer services to registrars, and by extension, to .CA domain registrants, as well as any internet user visiting a .CA domain name. Specifically, CIRA operates the authoritative DNS for the .CA TLD, evidenced in CIRA's supporting affidavit detailed at paragraphs 17-25, and maintains the .CA WHOIS directory described at paragraphs 27-34.

21. By participating in earlier proceedings related to the issue of website blocking, CIRA has proven its genuine interest. CIRA has already deployed its knowledge, skills, and resources to address these issues in related proceedings. That fact suggests CIRA will deploy its knowledge, skills, and resources to help this Court too. For example, CIRA provided a submission to the CRTC in response to a 2018 proposal for a site blocking regime, detailed at paragraph 50 of the *Holland Affidavit*. CIRA also appeared before and provided a submission to the government-appointed panel responsible for reviewing broadcasting and telecommunications law more generally in 2019, detailed in paragraph 51. Paragraph 52 shows CIRA's commitment to addressing the specific issue of site blocking by participating in international law and policymaking proceedings on this topic.

22. Additionally, CIRA participates in policy discussions, and in many cases leads initiatives related

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[34] *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd*, 2000 FCA 233 at para 11.
[35] *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 257 at paras 5, 8.

to the technical coordination and interoperability of the DNS in various international fora. These include ICANN, the Internet & Jurisdiction Policy Network (I&J), the Internet Governance Forum (IGF), and the Internet Engineering Task Force (IETF), and the American Registry for Internet Numbers (ARIN). CIRA's involvement in these activities is detailed at paragraphs 44-48.

23. The *Holland Affidavit* also explains, at paragraph 53 why, despite its genuine interest in site blocking, CIRA did not intervene in the original proceedings in the Federal Court. Those reasons include the fact that CIRA was unaware of the proceeding until it was too late, and that CIRA could not have anticipated in advance the effects of the Federal Court decision on its mandate. Once CIRA saw and considered the Federal Court's order and reasons for decision, it decided to intervene.

The availability of a blocking order is a justiciable issue of veritable public interest.

24. If the availability of a site blocking order were not a justiciable issue, this appeal would not happen.[36] There would be no proceeding for CIRA to intervene in. The fact that the appeal is happening proves there is a justiciable issue.

25. The nature and extent of the public interest in this appeal are important. The public dimensions of this appeal could be considered here, or below in the context of the interests of justice. For convenience, CIRA's submissions on the public interest are put here.

26. The issue of site blocking that is now before this Court has assumed "such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court."[37] This proceeding is the first time that an appellate court in Canada has considered the issue of site blocking. As noted by the Federal Court: "An order of this nature has not previously issued in Canada".[38] As such, the appeal raises novel and fundamental questions about website blocking, including the most basic questions like: "What is the test to be applied?"[39]

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[36] *Pictou Landing*, *supra* note 20 at para 9.
[37] *Pictou Landing*, *supra* note 20 at paras 9, 11.
[38] *Bell Media Inc et al v John Doe 1 et al*, 2019 FC 1432 at para 8.
[39] *Ibid* at heading C.

27. International media and leading internet law scholars have drawn attention to this proceeding.[40] Reports or editorials have appeared in leading newspapers in English and French, from the Canadian Press, and on law firm blogs.[41]

28. While website blocking is a matter of veritable public interest and CIRA is genuinely interested in this appeal, CIRA does not seek "public interest" standing. CIRA's Rule 109 motion for leave to intervene is different in that way from the issues at the Federal Court in *Canadian Council for Refugees*[42] and at the Supreme Court in *Downtown Eastside*.[43]

29. CIRA's interest is, however, a hybrid interest. CIRA is not a clinic, think tank or other kind of public interest non-governmental organization. But it does have a public interest mandate. Paragraphs 4-8 of the *Holland Affidavit* explain how CIRA was created as a not-for-profit corporation and given an explicit mandate from the Government of Canada to administer and manage the internet DNS and related technology in the public interest. By necessity CIRA is the only organization that has the authority to operate the authoritative .CA ccTLD DNS servers and the WHOIS look-up database. Its perspective is not only distinct but unique.

No other reasonable or efficient means to submit CIRA's perspective exist.

30. The issues that CIRA is genuinely interested in are being litigated in this specific proceeding,

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[40] Micheal Geist, "Fool's Gold: Why a Federal Court Judge Was Wrong to Issue a Website Blocking Order Against GoldTV" *www.MichaelGeist.ca* (19 November 2019), cited by Mike Masnick, "Canadian ISP Teksavvy Fights Back Against Overbroad Copyright 'Blocking Order' For GoldTV" *Techdirt* (4 December 2019).

[41] Alexandra Posadzki, "Court ruling to block pirate website could lead to a flood of similar cases, experts say" *The Globe and Mail* (19 November 2019); Richard C Owens, "In GoldTV, internet activism runs aground. Again" *Financial Post* (29 November 2019); Vincent Brousseau-Pouliot, "Un tout premier site de piratage bloqué au Canada", 19 novembre 2019, *la presse*; David Friend, "Federal Court issues first ever order to block piracy website", November 19, 2019, *The Canadian Press*; Barry Sookman, "Site blocking orders come to Canada: GoldTV.biz", November 19, 2019, McCarthy Tetrault.

[42] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131.

[43] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

not another proceeding. It would be unreasonable and inefficient for CIRA to seek other ways to submit its perspective on these now-live issues. In fact, there are no other judicial, administrative, legislative, or policy proceedings going on right now that CIRA could participate in instead of this appeal.

31. Furthermore, this factor is relatively unimportant compared to other factors. As Justice Stratas explained in *Pictou Landing*, the more relevant question is whether "the proposed intervener can help and improve the Court's consideration of the issues".[44] CIRA's written submissions above and below demonstrate that CIRA can help the Court.

CIRA's position is not adequately defended by any other party.

32. No other party would or could adequately defend CIRA's distinct position.

33. CIRA proposes to intervene not to help the Appellant,[45] but to help the Court. The Appellant is well represented by experienced counsel. But CIRA's perspective on the issues is different from the Appellant's perspective. CIRA occupies a different part of the internet ecosystem than the Appellant and all of the other Third Parties. It has, therefore, different perspectives on technical matters, service provision, and internet governance more generally.

34. On a technical level registration authorities and connectivity providers both play roles in delivering a website to an end user, but those roles are distinct. As explained at paragraphs 17-34 of the *Holland Affidavit*, CIRA is authoritative for the .CA domain and operates authoritative DNS servers and the .CA WHOIS directory. ISPs such as the Appellant may operate recursive DNS resolvers, but recursive resolvers are not the authoritative sources of information about how to reach resources on the internet.

35. In terms of service provision, CIRA services are distinct from ISPs. CIRA provides registry, DNS, and cybersecurity services. Unlike ISPs, CIRA does not service internet subscribers as its

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[44] *Pictou Landing*, *supra* note 20 at para 9.
[45] See for example *Zaric*, *supra* note 32 at paras 18-19; *Tsleil-Waututh*, *supra* note 31 at para 52.

primary "customers". CIRA certifies registrars to issue .CA domain names to registrants, and serves Canada's internet community generally (*Holland Affidavit*, paragraphs 13, 22-25).

36. Another distinction between CIRA and ISPs, including the Appellant, is in respect of involvement in internet governance matters more broadly. While ISPs are no doubt interested in internet governance is Canada and abroad, only CIRA is officially mandated by the Government of Canada to represent the .CA domain, DNS, and related systems internationally. CIRA's involvement in domestic and foreign internet policymaking forums, as described at paragraphs 44-48 and 52 of the *Holland Affidavit*, means that its perspective will be different than ISPs.

37. CIRA is also distinct from vertically integrated groups of related media and telecommunications companies that both own and provide access to content on the internet. CIRA's perspective is, therefore, different from the perspective of the Respondents in this appeal, *i.e.* the original applicants, who are each affiliated with their own respective ISPs against whom the site blocking order is sought.

38. CIRA is also not trying to stand in for an absent party (most conspicuously, the absent Defendant in the underlying proceedings) as in *Sports Maska.*[46] CIRA's mandate is not to represent .CA domain name registrants, but to actively and objectively support all members of the internet community. The absence of any Defendant/Respondent does, however, highlight the importance of presenting this Court with different sides of the issue.

39. At this stage in the proceedings, there is no intervener or proposed intervener similar to CIRA. That fact distinguishes CIRA's motion from the unsuccessful motions in *Canadian Council for Refugees*, where three proposed interveners were denied leave to intervene because three other organizations had already been granted public interest standing.[47] However, as explained in joint correspondence dated January 21, 2020 to the Court, CIRA and another proposed intervener, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) have consulted one another regarding

[46] Sport Maska, *supra* note 19.
[47] Canadian Council for Refugees (FC), *supra* note 42.

each's proposed intervention. Consultations prior to this motion have ensured that neither proposed intervener will duplicate the other's submissions. While the Appellant's grounds for appeal narrow the scope of questions on which submissions may be made, CIRA and CIPPIC would present this Court with different submissions based on their different expertise, experiences, and perspectives.

40. To grant leave to intervene, this Court needs to know not only that CIRA will make important submissions, but more specifically what those submissions will be.[48] Paragraphs 54-65 of the *Holland Affidavit* set out CIRA's proposed submissions.

41. If granted leave to intervene in this proceeding, CIRA would submit that that section 36 of the *Telecommunications Act* requires caution in the exercise of a court's discretion to grant a site-blocking remedy.

42. CIRA would submit that there are more effective and appropriate control points on the internet to address allegations of copyright infringement. For example, rather than site blocking, which CIRA would submit conflicts with section 36 of the *Telecommunications Act*, content owners could pursue a range of other measures.

43. Those measures would include, in CIRA's submission, seeking disclosure of the identity of a domain name registrant so that the defendant can be named, served, and involved (or, knowingly, not involved) in the proceeding. CIRA maintains information about registrants as part of managing the WHOIS look-up. Its practice is to disclose this information to third parties if legally compelled, such as pursuant to an order from a Canadian court.

44. CIRA would assist the Court to assess the relative advantages and disadvantages of involving domain name registries, rather than ISPs, in addressing alleged online copyright infringement. CIRA would submit that less extreme measures than site blocking may also involve identifying, notifying, and involving the operators of servers where allegedly infringing content is hosted. It might also

[48] *Ishaq*, *supra* note 21 at para 9.

involve identifying and enlisting the cooperation of other third parties, such as information location, content distribution, and payment intermediaries. Any and all of those options are, while still extreme, more consistent with the *Telecommunications Act* and less intrusive into the technical architecture of the internet than the remedy sought from and granted by the Federal Court.

45. Alternatively, CIRA would submit to this Court that some form of CRTC involvement in the process of issuing, altering, coordinating, or enforcing a site-blocking order might be required by section 36. Based on its technical expertise and experience with internet governance, CIRA could help this Court consider why such a solution would be less harmful to the functioning of the internet and what options exist for implementing it.

46. CIRA would also make submissions on interpreting and applying the test for a mandatory site-blocking injunction. The interpretation and application of the test for a site-blocking injunction requires, CIRA would submit, exceptional circumstances and minimal impairment of the technical architecture and functions of the internet.

47. Based on its experiences participating in international fora where internet governance, and site blocking specifically, is discussed, CIRA would submit that the factors considered in foreign cases could be relevant in certain situations in Canada. CIRA would assist this Court in considering international approaches to the issue of site blocking, including whether and how those approaches fit with the systems for administering internet domain names and the DNS in Canada.

48. However, CIRA would submit that different factors than those emphasized by the Federal Court, or likely to be emphasized by the parties, are the most relevant. For example, the Federal Court's reasons for decision include only one short sentence on safeguards. CIRA would submit that safeguards are a crucial consideration. Also, in considering fairness, the Federal Court's reasons only touch upon the topic of network neutrality. CIRA would submit to the Court that this factor requires more attention and detail than the Federal Court provided.

49. In making these submissions, CIRA would bring a different perspective—that of a neutral, not-

for-profit organization mandated by the Government of Canada to steward the .CA domain and related internet architecture, with considerable technical expertise and national and international internet governance experience—that is not represented by any party or other proposed intervener.

CIRA's intervention serves the interests of justice.

50. CIRA's submissions above already demonstrate two crucial points related to the "interests of justice" factor: CIRA itself has a genuine interest in this matter so is likely to provide the Court with valuable submissions; and this matter is of sufficient public interest to warrant that further and different perspectives beyond the parties be presented to the Court. The remainder of this subsection of CIRA's Written Representations reinforces the reasons that CIRA's intervention serves the interests of justice, and that CIRA's intervention is consistent with need for fairness, expedience, and economy required by Rule 3 of the *Federal Courts Rules*.[49]

CIRA will make specific legal not general social submissions.

51. CIRA understands that its role as a proposed intervener is to help this Court interpret and apply the law as it is, not as CIRA wishes it where.[50] CIRA does not confuse the judges of this Court "for legislators or constitutional framers who can enshrine grand policies into law."[51]

52. CIRA proposes to assist this Court specifically in its submissions on section 36 of the *Telecommunications Act* and the test for a mandatory injunction. On these issues, CIRA can help the Court assess the likely results of rival interpretations because of its practical experience working on telecommunications and internet governance issues. This Court recently recognized the important role of interveners with such experience "on the ground, in the field" in *Atlas Tube*.[52]

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[49] *Federal Courts Rules*, *supra* note 17; see also *Hryniak v. Mauldin*, 2014 SCC 7.
[50] *Ishaq*, *supra* note 21 at paras 9, 19, 25-27. See also *Atlas Tube Canada ULC v. Canada (Minister of National Revenue)*, 2019 FCA 120, at para 8.
[51] *Ishaq*, *supra* note 21 at para 9.
[52] *Atlas Tube Canada ULC v Canada (Minister of National Revenue)*, 2019 FCA 120, at paras 11 and 17.

53. On the interpretation and application of the test for a mandatory site-blocking injunction, CIRA will refer to international legal notions and standards but only because the circumstances truly require it. This appeal is different from the proceeding in *Prophet River*, where an unsuccessful applicant to intervene could not demonstrate exactly how international law was relevant.[53] The Appellant's third ground of appeal alleges that relying on foreign rather than Canadian law on mandatory injunctions was a legal error.

54. The international legal dimension to this appeal does not turn on public international law, about which CIRA professes no particular expertise. Rather, determining the issues in this appeal requires analyzing foreign law on website blocking, comparing approaches to internet governance internationally, and understanding differences between the global regulation of country-code and other top-level domain names and domain names in general. The *Holland Affidavit* as a whole demonstrates specifically the knowledge and skills CIRA can offer this Court on those issues. So, without duplicating the Appellant's arguments, CIRA's submissions will help the Court to determine in which ways foreign and Canadian approaches are compatible or incompatible.

55. Many of the Court's "itches" in this appeal can be scratched by CIRA, to use the analogy from *Ishaq*.[54] The law on website blocking orders is unsettled and the Court's need for help from organizations with different perspectives is real. CIRA will share its insights on why this is not one of the rare cases where it is appropriate to depart from settled authority on mandatory injunctions. However, if the Court decides that responsible, incremental change is warranted, CIRA can help the Court understand and assess multiple options for applying the law to these facts. CIRA does not propose to address the *Charter* issue in this appeal because—although it is real, important, and unsettled—other potential interveners are better suited to help the Court on that particular issue.

56. In short, CIRA proposes to help out where it can and butt out where it cannot.

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[53] *Prophet River*, *supra* note 30 at para 10.
[54] *Ishaq*, *supra* note 21 at para 12.

CIRA will rely on not change the factual record before the Court.

57. Unlike the applicant in *Doctors for Refugee Care* sought to do, CIRA will not raise new issues or arguments unsupportable by the factual record in the underlying proceeding.[55] This is not an empty promise like some interveners make to "take the evidentiary record as they find it but then in the next paragraph offer arguments dependent on facts absent from the evidentiary record."[56] CIRA will also not try to "smuggle"[57] social science evidence into its authorities or memorandum, unlike the applicants in *Ishaq*.

58. CIRA has closely investigated the evidentiary record and the specific issues in the case. Based on the Agreement re: Appeal Book filed by the parties on January 13, 2020 and the underlying materials referenced in that Agreement, CIRA can "offer much detail and particularity on how it will assist the Court."[58] All of the evidence needed to support CIRA's submissions described in this Motion is already in the record that will be considered by this Court.

59. For example, the *Quek Affidavit*, which will be Tab 22 in the Appeal Book, contains all of the facts required to support CIRA's submissions about technical issues associated with the DNS, the role of ISPs, and several site blocking examples.[59] The *Stewart Affidavit*, which will be Tab 30, establishes the relevant facts regarding the role of the registry and registrars vis-à-vis ccTLDs and the DNS.[60] Sufficient information is also contained in the *First Remillard Affidavit*, which will be Tab 36, and the *Second Remillard Affidavit*, about domains, subdomains, the WHOIS look-up service, and related facts.[61]

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[55] See Zaric, *supra* note 32 at para 14, citing Canada (Attorney General) v Canadian Doctors for Refugee Care, 2015 FCA 34 at para 19; Ishaq, *supra* note 21 at para 17; Quan v Cusson, 2009 SCC 62; and Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd, 2002 SCC 19.
[56] Ishaq, *supra* note 21 at para 9.
[57] Zaric, *supra* note 32 at para 14.
[58] Ishaq, *supra* note 21 at para 10.
[59] *Affidavit of Erone Quek*, sworn July 22, 2019.
[60] *Affidavit of Paul Stewart*, sworn August 29, 2019.
[61] *First Affidavit of Yves Remillard*, sworn July 15, 2019; *Second Affidavit of Yves Remillard*, sworn September 3, 2019.

60. In sum, CIRA will "propose to work within the ambit of the existing proceedings and the existing evidentiary record but propose to do something different than the existing parties", which above all is to "acquaint the Court with the larger implications associated with its ruling."[62]

CIRA's motion for intervention is early not late in the appeal proceedings.

61. No parties have filed their memoranda of fact and law yet. CIRA moved quickly after the notice of appeal was filed because it was keen for its valuable perspective to be heard by the Court. Unlike the unsuccessful applicant in *Doctors for Refugee Care*,[63] CIRA has left ample time for the parties to respond to its submissions if they wish. CIRA has anticipated responses to its submissions because, although CIRA will not file new evidence or raise new issues, its different insights are important enough for other parties to address.

62. Admittedly, CIRA faces a catch-22 with the timing of this motion. The longer CIRA waits to make its motion, the more certain it can be about the need for its assistance and the more specific it can be in differentiating its proposed submissions. But delay risks creating problems for the parties and drawing criticism from the Court. The sooner CIRA makes its motion, the less certain it can be about its value and the less detailed it can be in comparing its submissions to the parties' submissions.

63. This motion strikes a compromise between filing too soon and filing too late. As evidenced at paragraph 69 of the *Holland Affidavit* this motion comes as soon as practicable for CIRA. Immediately after the Appellant filed its notice of appeal, CIRA began making strategic decisions, obtaining appropriate internal approvals, retaining and instructing counsel, and preparing this motion even through a holiday period. Differentiating CIRA's submissions from those of the parties (explained in detail above) was done on the basis of the parties' positions taken at the Federal Court, the parties' positions and public statements in related matters, and the nature of the parties' interests and business models.

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[62] *Tsleil-Waututh*, *supra* note 31 at para 49.
[63] *Doctors for Refugee Care*, *supra* note 55.

CIRA's participation will promote not undermine the appearance of fairness.

64. CIRA's intervention will strengthen the legitimacy and public acceptance of the Court's eventual determination. Justice Stratas explained in *Pictou Landing* that exposing the Court to broader perspectives is sometimes necessary to not only be doing, but also "appear to be doing", justice in the case.[64] This is not an appeal where the appearance of fairness would be harmed by allowing too many interveners on only one side of the case, as this Court was concerned about in *Gitxalla Nation*[65] and mentioned in *Zaric*[66] and *Atlas Tube*.[67] Rather, CIRA's intervention would help to balance the perspectives represented by the parties, one of which is isolated from all others in its opposition to the order of the Federal Court. With CIRA's proposed intervention, there is no perceived conflict of interest or bootstrapping submissions on an earlier decision as in *Girouard*. CIRA's motion is not an "end-run" around the time limits or cost-related risks of an application to become a full party, as the unsuccessful applicant in *Tsleil-Waututh*.[68]

The Court could hear and decide the case better with CIRA than without CIRA.

65. To summarize: the submissions above demonstrate that CIRA is directly affected by and genuinely interested in this appeal because the blocking order impacts CIRA's ability to steward the .CA domain, and provide high quality registry, DNS and cybersecurity services. The availability of a site-blocking order is a justiciable issue of veritable public interest, as proven by CIRA's national and international experiences with the matter. There is no other reasonable or efficient way to submit CIRA's perspective to the Court, because the issues CIRA is genuinely interested in are already being raised now, in this particular proceeding. CIRA's position is not adequately represented by one of the parties because the perspective of Canada's internet registration authority is different from the perspective of media companies, communications intermediaries, website operators, and public

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[64] *Pictou Landing*, *supra* note 20 at para 9.
[65] *Gitxalla Nation v Canada*, 2015 FCA 73 at paras. 21-24.
[66] *Zaric*, *supra* note 32 at para 12.
[67] *Atlas Tube*, *supra* note 52 at para 12.
[68] *Tsleil-Waututh*, *supra* note 31 at paras 43-44.

interest organizations. CIRA's intervention serves the interests of justice because the issue of site blocking is being litigated at an appellate court for the first time in Canada. The issue has such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties. The proposed intervention would assist the Court without any delay or prejudice.

66. Of course this Court *could* determine the issues without CIRA. But the more relevant question is whether this Court *should* determine the issues without CIRA. CIRA will bring further, different, and valuable insights and perspectives that will help the Court hear and decide this appeal.

PART IV– COSTS

67. CIRA will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V– ORDER SOUGHT

68. CIRA respectfully requests an Order from this Court:

a) Granting CIRA leave to intervene in this appeal;

b) permitting CIRA to file a factum of no greater length than 20 pages;

c) permitting CIRA to present oral argument for 15 minutes at the hearing of this appeal; and

d) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED February 4, 2020.

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PART VI– TABLE OF AUTHORITIES

Authority		Referenced
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2	*Apotex Inc v Canada (Minister of Health)*, File No. T-2074-99.	9
3	*Atlas Tube Canada ULC v Canada (Minister of National Revenue)*, 2019 FCA 120.	52, 64
4	*Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34.	57, 61
5	*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.	28
6	*Canada (Minister of Public Safety and Emergency Preparedness) v Zaric*, 2016 FCA 36.	33, 57, 64
7	*Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131.	28, 39
8	*Canadian Council for Refugees v Canada (Minister of Immigration, Refugees and Citizenship)*, 2019 FC 418.	25
9	*Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd*, 2000 FCA 233.	20
10	*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236.	14
11	*Girouard v. Canada (Attorney General)*, 2019 FC 434.	13, 64,
12	*Gitxalla Nation v. Canada*, 2015 FCA 73.	64
13	*Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 119.	17, 19
14	*Hryniak v. Mauldin*, 2014 SCC 7.	50

15	*Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 151.	13, 40, 51, 55, 57, 58,
16	*Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19.	57
17	*Pictou Landing First Nation v Canada (Attorney General)*, 2014 FCA 21.	10, 13, 24, 26, 31, 64,
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19	*Quan v. Cusson*, 2009 SCC 62.	57
20	*Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74 (FC)	13, 15, 16
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22	*Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 90 (FCA)	13, 15, 16
23	*Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44.	10, 13, 16, 38,
24	*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102.	17, 33, 60, 64
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25	*The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.	2
26	*Copyright Act*, RSC 1985, c C-42.	2
27	*Federal Courts Rules*, SOR/98-106.	9, 10, 50
28	*Telecommunications Act*, SC 1993, c 38.	2, 7, 11, 41, 42, 52
Secondary Materials		
29	Vincent Brousseau-Pouliot, "Un tout premier site de piratage bloqué au Canada", 19 novembre 2019, *la presse*	27

30	David Friend, "Federal Court issues first ever order to block piracy website", November 19, 2019, *The Canadian Press*	27
31	Micheal Geist, "Fool's Gold: Why a Federal Court Judge Was Wrong to Issue a Website Blocking Order Against GoldTV" *www.MichaelGeist.ca* (19 November 2019)	27
32	Mike Masnick, "Canadian ISP Teksavvy Fights Back Against Overbroad Copyright 'Blocking Order' For GoldTV" *Techdirt* (4 December 2019)	27
33	Richard C Owens, "In GoldTV, internet activism runs aground. Again" *Financial Post* (29 November 2019)	27
34	Alexandra Posadzki, "Court ruling to block pirate website could lead to a flood of similar cases, experts say" *The Globe and Mail* (19 November 2019)	27
35	Barry Sookman, "Site blocking orders come to Canada: GoldTV.biz", November 19, 2019, McCarthy Tetrault.	27